

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-180010.05

DATE: January 2, 1976

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MATTER OF: Kelly Air Force Base back pay - pre-arbitration
settlement agreement

DIGEST:

1. The Back Pay Act of 1966, 5 U.S.C. 5596, requires, among other things, a determination that there has been an unjustified and unwarranted personnel action before an award of back pay under that Act may be made. Assuming a determination has been, or is, made by the appropriate authority in this instance that there has been an unjustified or unwarranted personnel action on the part of management, an award of back pay may be made under the above-mentioned statute.
2. Whether employees should be paid overtime under Provisions of a collective bargaining agreement cannot be determined by the Comptroller General since this is a matter that would best be decided by an arbitrator after hearing evidence and arguments from the parties involved.

This matter involves a request for an advance decision from the Commander, Kelly Air Force Base, Texas, as to whether the Comptroller General will authorize payments of back pay pursuant to a pre-arbitration settlement agreement.

Briefly stated, the facts in the case are as follows. The normal workweek in the 433rd Tactical Air Wing (TAW) at Kelly Air Force Base, Texas, is five 8-hour days, Monday through Friday. In February 1975, the workweek was altered by the Activity (management) so that 30 TAW employees worked during the weekend of February 22-23. Rather than pay overtime for this necessary weekend support, it was the decision of management that the 30 TAW employees involved not work an equivalent number of days during the normal workweek. This requirement to work was generated

by a practice for a joint MAC/TAC Operational Readiness inspection which was scheduled and took place March 8 and 9, 1975. There were only two options to provide maintenance support under such circumstances: (a) pay the necessary support people overtime as had been done in the past, or (b) reschedule the workweek of the people needed. The decision was made to reschedule the workweek on the grounds that it was necessary to meet a mission requirement.

The certified employee representative (union) at Kelly Air Force Base alleged that this action by management violated the collective bargaining agreement between the parties. The union subsequently grieved and requested arbitration pursuant to Article X, Section 11 of the negotiated grievance procedure which, in part, provides:

"Tours of duty shall not be established or modified solely for the purpose of avoiding payment of holiday, premium, or overtime pay; however, it is recognized the Employer has the obligation to plan the utilization of its resources so as to minimize the requirements for holiday or overtime work."

At a meeting held June 13, 1975, and attended by representatives of both management and the union, it was agreed that management would pay the overtime in question to the 30 employees involved if the Comptroller General would indicate that such payments could legally be made. A written statement to this effect, signed by representatives of both parties, provided as follows:

"Reference Union grievance in regard to the change of tour of duty by the 433rd to include work performed on the weekend of 22-23 February 1975. It is agreed that management will pay overtime to the thirty (30) wage grade employees involved for work performed on that weekend if the Comptroller General indicates payment can be legally made. Management agrees to write to the Comptroller General requesting guidance. Union agrees to withdraw their request for arbitration pending guidance from the Comptroller General"

In connection with the above described events the following questions have been submitted to this Office by management:

"(a) Do the provisions relating to overtime assignment in the contract between the parties effectively withdraw discretion from the Activity?

"(b) May an Activity pay back pay as part of a good faith settlement in a contract violation case when the Activity determines such payment best serves the interests of the Government?"

Authority under which a Government agency may retroactively adjust an employee's compensation is contained in the Back Pay Act of 1966, Codified in 5 U.S.C. 5596 (1970), which provides, in part, as follows:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period."

Implementing regulations for the Back Pay Act are contained in 5 C.F.R. Part 550, subpart H. In effect, the law and regulations

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provide that an appropriate authority, such as an agency head or someone designated by him, must determine that an agency personnel action has been improper or erroneous as to specific employees which directly results in the reduction of their pay, allowances, or differentials. 54 Comp. Gen. 761 (1975). Such an improper action would include the violation of a nondiscretionary agency regulation or provision of a negotiated agreement. 54 Comp. Gen. 312 (1974).

The record does not clearly indicate whether management has determined that its actions in this instance constituted an unjustified or unwarranted personnel action. However, assuming that such a determination was, or is, made by the appropriate authority, it is our view that management may pay back pay as part of a good faith settlement under the circumstances described. Question (b) is answered accordingly.

The first question, i.e., whether the contract provisions effectively withdraw discretion from the Activity, depends on specific factual findings as well as legal determinations. We believe that this is a matter that would best be decided by an arbitrator after hearing evidence and arguments from the parties involved.

PAUL G. DARRING

Acting Comptroller General
of the United States